IN THE

Supreme Court of the United States

JUN 16 1974
MICHAEL RODAK, JR., C

October Term, 1973

No. 73-6462

POLLY ADAMS,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

In Indictment No. SGJ 7-71-10, the State Grand Jury named fifteen individuals as defendants. Among those named were Polly Adams, the present petititoner, and one John Cantoni. (Pa-13).

Petitioner Adams along with Cantoni and several others were charged in Count I of the Indictment with conspiracy to possess methamphetamine and cocaine with intent to distribute, contrary to *N.J.S.A.* 24:21-19 (a) (1); and in Count II with conspiracy to possess the same substances, contrary to *N.J.S.A.* 24:21-20 (a) (1). Petitioner Adams was not named in Count III. Count IV charged only Adams and Cantoni with possession of methamphetamine, contrary to *N.J.S.A.* 24:21-20 (a) (1). (Pa-13)

Trial was commenced on May 31, 1972, before the Honorable Benjamin A. Rimm, J.C.C., and a jury. Petitioner Adams was found guilty on Counts II and IV. (Pa-14).

On June 26, 1972, motions for a new trial were made on behalf of petitioner and the other defendants. These motions were heard and denied by Judge Rimm. (TM38-16, 17).*

On the same date, Judge Rimm imposed sentence. Petitioner was sentenced to two concurrent terms at the New Jersey Reformatory for Women at Clinton. (Pa-14).

On appeal to the Appellate Division of the Superior Court, petitioner and Cantoni complained, *inter alia*, that they did not receive effective representation by their assigned counsel. On November 26, 1973, the Appellate Division affirmed their convictions, but ruled that Petitioner must be resentenced because she was not eligible for an indeterminate term. (Pa-10).

Petitioner's subsequent request for review of her cause by the New Jersey Supreme Court was denied on February 11, 1974. (Pa-12).

This Petition for Certiorari was filed on March 26, 1974.

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* TM refers to the transcript of the motions for a new trial.
T refers to the transcript of the trial.

COUNTER-STATEMENT OF FACTS

The Petitioner and defendant Cantoni were represented at trial by the same assigned counsel from the Office of the Public Defender. On the first day of trial May 31, 1972, prior to the selection of a jury, petitioner's counsel requested the court to entertain a motion to suppress evidence. (T2-15 to T3-9). Counsel explained that there had been no motion to suppress filed earlier, because Cantoni had indicated a willingness to enter a plea of guilty in exchange for a dismissal of the charges against petitioner. However, the plea negotiations had broken down and Cantoni had decided to proceed to trial. (T3-2 to 6; T4-11 to 15).

The prosecutor informed the trial court that, at the arraignment in January 1972, the assignment judge had established a timetable for all pretrial proceedings in this case. That schedule required that all motions to suppress be filed by April 17, 1972. Although the period of time thus alloted was well in excess of the usual 30 day deadline set forth in *R.*3:5-7 of the Rules Governing the Courts of New Jersey, no motions to suppress had been filed on behalf of any of the defendants. (T4-16 to T5-23).

In response to the prosecutor's statements, defense counsel for petitioner and Cantoni attempted to explain or excuse his failure to timely move:

> "No, your Honor, I just said that we were under the assumption that Mr. Cantoni was going to plead, and, it is true, we got into this case back in February or March, I believe, and, since that time, I have been in Mays Landing practically every day, I have been engaged in a trial that just finished this morning, that has gone four weeks, and prior to that I was in a trial that was two or three days, so, since the 2nd of May I have been in trial every day.
>
> Now, had we known that Mr. Cantoni was going to go to trial definitely, we would have certainly done more to make sure that this motion was filed within the time limit, but I think your Honor can appreciate the fact that we are over burdened, and, when we get the feeling that a man is going to take a plea, and is going to be satisfactory to him and to the State, then we don't ordinarily put in as much time as privately retained Counsel would, and that is exactly what happened in this situation." (T25-1 to 19).

The court noted that it was familiar with defense counsel's work and that defense counsel usually prepared well for trial. While acknowledging that there may have been factors at work which were beyond counsel's control, the court nevertheless denied counsel's request to present the motion out of time. (T27-9 to 13).

The State's case on the conspiracy charges in Counts I and II consisted almost entirely of intercepted telephone conversations between and among the various named defendants who proceeded to trial. Before any evidence was presented to the jury, all counsel agreed that certain foundation evidence would not be contested. Defense counsel admitted that certain telephone numbers which appeared in the intercepted calls belonged to certain subscribers, including the defendants. (T125-24 to T128-21). Defense counsel further stipulated that the logs compiled by the State Police concerning the intercepted conversations were accurate. These logs contained the time and date of each intercepted and recorded call, and a brief synopsis of its content. (T130-16 to T142-6).

The first witness for the State was Detective John Logan of the New Jersey State Police. As a member of the Electronic Surveillance Unit, his duties were to install and maintain the wiretap and to compose composite tapes from the original tapes of conversations intercepted during the investigation. (T170-10 to 25). After relating his qualifcations and experience in the field of electronic investigation, Detective Logan testified that he had personally installed a wiretap on two telephone facilities located at 801 Zion Road, Egg Harbor Township, the residence of petitioner and John Cantoni. (T173-11 to 14). The witness continued that the tap was connected to a pen-register and a tape recorder. (T181-4 to 10). The tape recorder was activated automatically when a call was placed or received on one of the monitored facilities. (T196-21 to T197-15).

Detective Logan explained that from the 70 or 80 reels of tape which were filled during the investigation he had composed a composite tape which consisted of selected conversations from the original tapes. In making the composite tape, Detective Logan had been instructed which conversations were to be included. After carefully checking to make sure that he was selecting the proper conversation, he had recorded each conversation in its entirety and without alteration onto the composite tape. (T185-25

to T188-23; T217-19 to T218-2). In addition to the four reels of composite tapes, Detective Logan also composed a composite log which consisted of the time and date of each conversation in the composite tapes, the telephone facility monitored, an indication whether the call was incoming or outgoing, and, if outgoing, the number called. This information was taken from the original logs. (T188-24 to T189-6). In all, the wiretap had been maintained for sixty days ending on June 13, 1971, and the last call included on the composite tape occured at 9:06 P.M. on June 8, 1971. (T245-1 to 22).

The next witness for the State was Detective William P. Sullivan of the New Jersey State Police. Assigned to the Narcotics Bureau for Southern New Jersey, Detective Sullivan was field supervisor of all narcotics investigations in that area. He was the officer in charge of the investigation of this case. (T273-1 to T274-7).

After stating his experience and training in narcotics investigation, Detective Sullivan was accepted by the court as an expert on illicit drug traffic, use and terminology. (T274-8 to T277-1; T279-19). In that expert capacity, Detective Sullivan related some background information on the usual procedures followed in the unlawful trade of cocaine and methamphetamine. He also explained some of the common terminology extant on the street regarding these substances, and offered his experiences regarding the effects of these drugs on a user. More specifically, he informed the jury of the price of various quantities of each drug in Atlantic County during the time in question. Notably, he stated that the drugs were much less expensive when purchased in large quantities. (T279-21 to T280-20; T283-10 to 25; T284-17 to 20; T285-12 to T286-2; T286-25 to T287-3; T290-10 to T292-18; T294-7 to 16; T295-4 to T296-2; T300-9 to T301-16).

At this point, the State began playing for the jury the intercepted telephone conversations which had been recorded onto the composite tape. Detective Sullivan remained on the stand throughout the playing of these conversations in order to identify the voices of the conversants and to explain the terminology used.

The playing of the tapes was interrupted on a number of occasions to allow certain State Police officers to testify concerning the surveillances which they conducted as a direct result of hearing particular intercepted conversations. Detective Sullivan also participated in several of these surveillances. The

surveillances corroborated the conversations which precipitated them and confirmed the identity of the participants in those conversations. (T312-5 to T313-4; T325-13 to T326-11; T379-5 to 10; T379-25 to T381-22; T404-22 to T406-3; T431-10 to T433-1; T454-10 to T455-14; T510-9 to T411-13; T552-21 to T555-9; T569-2 to 20; T612-1 to T614-25).

The primary topic of the intercepted conversations was the possibility of obtaining illicit drugs. The picture which emerged was that John Cantoni was the central figure who was collecting money from several of the other defendants in order to effect a transaction for a large quantity of methamphetamine. By buying in bulk, all of the defendants would be able to obtain more of the drug for their money. The drugs obtained were then to be distributed to the various defendants for their use or for further distribution in smaller quantities for profit.*

The final conversation played for the jury occurred at 9:06 P.M., on June 8, 1971. Mary Ladd, the petitioner's sister who lived but a few blocks from petitioner, (T902-12 to T906-4), called the Cantoni-Adams residence and spoke with petitioner. (T664-17 to T665-3). The petitioner told Ladd to come over immediately. Petitioner said that Ladd would be very happy because "what you've been waiting so long for is here." Petitioner exhorted Ladd to hurry because Cantoni had not yet called the others. *(CT74).**

Upon hearing this conversation through the wiretap facilities, Detective Sullivan immediately contacted the State Police barracks in Mays Landing. Approximately one half hour later, one Trooper Penvin arrived. Sullivan and Penvin proceeded to the Cantoni-Adams residence and entered it. As a result of the search, they obtained two small packets of methamphetamine which were found lying on a coffee table in the living room. A straw and several small manila envelopes were also found on the

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* For the sake of brevity, the State has not attempted to set forth a summary of the conversations played for the jury. However, should this Court desire, the State will readily make available both a summary of the conversations and the composite tapes themselves.

** This notation refers to the conversation in the composite tape and the number assigned to that conversation in the composite log.

table. (T665-4 to T667-15; T1195-1 to T1196-19). Petitioner and Mary Ladd were seated at that table when the officers entered the house. (T683-25 to T686-15).

Following their motions for judgments of acquittal T1225-1 to T1256-5), all defendants rested without presenting any evidence. T1256-8 to T1257-12).

LEGAL ARGUMENT

PETITIONER WAS EFFECTIVELY AND ADEQUATELY REPRESENTED BY HER ASSIGNED COUNSEL.

Petitioner was represented at trial by counsel from the Office of the Public Defender. As noted in the Counter-Statement of Facts, counsel did not file a timely motion to suppress the evidence against the petitioner, but sought permission to present such a motion on the first day of trial. This request was denied. Petitioner now contends that the absence of a motion to suppress indicates the lack of preparation and consequent ineffectiveness of her counsel. She concludes that her constitutional rights have been violated and that this Court must review this case because of its public importance.

Every defendant who faces the possibility of incarceration must be afforded counsel. *Argersinger v. Hamlin*, 407 *U.S.* 25 (1972). This right is not satisfied by the mere appointment of an attorney, but requires that counsel be effective. *Gideon v. Wainwright*, 372 *U.S.* 335 (p963); *Powell v. Alabama*, 287 *U.S.* 45 (1932). It is the State's position here that petitioner has failed to allege any deprivation of effective assistance of counsel.

The explanation offered by assigned counsel for his failure to move for suppression was that defendant Cantoni had indicated that he would enter a plea in return for a promise by the State not to prosecute petitioner. (T4-11 to 15). Counsel for petititoner and Cantoni did not state that his failure to move was due to the allegedly unmanageable workload with which he was saddled. Rather, counsel had attempted to negotiate a suitable plea arrangement which would have completely immunized petitioner. In pursuing this strategy, counsel made a conscious decision to forego the motion. That choice was obviously intended to smooth the way to a successful completion of the agreement as well as to conserve counsel's energies. Attorneys, privately retained or otherwise, must often cope with time pressures. They must budget their efforts. In this case, petitioner's counsel, based upon his assessment of the situation, decided to concentrate on negotiating a plea and to dispense with the motion to suppress. While petitioner is understandably disgruntled at the ultimate result of the proceedings, she may not

attack a strategic decision by her counsel as depriving her of her constitutional rights. While counsel must be reasonably effective, the Constitution does not require that he be perfect or prophetic. See, *e.g.*, *United States v. DeCoster*, 487 *F.2d* 1197, 1201 (D.C. Cir. 1973); *Moore v. United States*, 432 *F. 2d* 730, 736-37 (3rd Cir. 1970).

Regardless of the reason why defense counsel did not file a timely motion to suppress the evidence against petitioner, no ground for a finding of ineffective assistance of counsel appears. Petitioner has failed to indicate any likelihood that she was prejudiced by counsel's inaction. Rather, the facts adduced at trial indicate that the warrantless search of petitioner's home was reasonable and lawful. Although the State bears the burden of establishing the validity of a warrantless intrusion, *Coolidge v. New Hampshire*, 403 *U.S.* 443, 454-55 (1971), the testimony of Detective Sullivan indicates that he was impelled to act swiftly in order to prevent the transportation, secretion or distribution of the drug shipment which petitioner had announced to Mary Ladd in the phone conversation of June 8. A warrantless search in the face of such exigencies is not unreasonable or unlawful. Cf. *United States v. Jeffers*, 342 *U.S.* 48 (1951).

If petitioner also complains that she lost the opportunity to challenge the propriety of the wiretap, she is in an even less favorable position. It is undisputed that the police were acting pursuant to court authorization in conducting the electronic surveillance. The interposition of, and approval by, a judicial mind creates a presumption that the police acted reasonably. *United States v. Ventresca*, 380 *U.S.* 102, 106-07 (1965). Hence, petitioner must at least assert that the affidavit submitted in support of the wiretap authorization was in some manner deficient. Lacking even a naked allegation to this effect, petitioner may not argue that she was in some way harmed by counsel's choice to forego the motion to suppress. Counsel is not required to "make every motion in the book" where no real possibility for success appears. *Harried v. United States*, 389 *F.* 2d 281 (D.C. Cir. 1967). Where, as here, no reason appears to question the legality of the police procedures, the failure of counsel to move to suppress is not evidence of incompetence or ineffectiveness. See, *e.g.*, *United States v. Hines*, 470 *F.* 2d 225, 231-32 (3rd Cir. 1972), *cert.* denied 410 *U.S.* 968 (1973); *United States ex rel. Watson v. Lindsay*, 461 *F.* 2d 922 (3rd Cir. 1972);

Government of the Canal Zone v. Wright, 460 *F.* 2d 1402 (5th Cir. 1972), *cert.* denied 409 *U.S.* 985 (1972); *United States v. Cox*, 439 *F.* 2d 85 (oth Cir. 1971), *cert.* denied 404 *U.S.* 829 (1971); *United States v. Meyer*, 417 *F.* 2d 1020 (8th Cir. 1969); *Harried v. United States, supra; Argo v. United States*, 378 *F.* 2d 301 (9th Cir. 1967), *cert.* denied 390 *U.S.* 907 (1968).

Even assuming *arguendo* that the evidence against the petitioner was unlawfully seized, the absence of a motion to suppress does not, of itself, demonstrate deprivation of counsel. The constitutional right to counsel is fundamental because it is the best assurance that the guilt or innocence of the accused will be fairly determined. The intimate nexus between this right and the integrity of the truth determining process compelled this Court's decision in *Gideon v. Wainwright, supra*, and later convinced this Court to accord retroactive effect to that decision. *Burgett v. Texas*, 389 *U.S.* 109 (1967).

In contrast, the exclusionary rule which prohibits use by the prosecuting authority of any evidence obtained in violation of the Fourth Amendment was not established to insure the accuracy of the determination of guilt or innocence. *Mapp v. Ohio*, 367 *U.S.* 643 (1961). Rather, it has always been understood that such a prophylactic barrier will more often obscure the truth than disclose it. The exclusionary rule is an attempt to deter future unlawful police activity, and not a remedy for past, completed intrusions. Its alleged benefit is for society generally, not for the party already aggrieved. *Coolidge v. New Hampshire, supra* at 488. Thus, the exclusionary rule was not accorded retroactive application. *Linkletter v. Walker*, 381 *U.S.* 618 (1965).

The foregoing discussion demonstrates that the mere failure of counsel to seek suppression of the evidence against the petitioner did not affect the integrity, fairness or public reputation of the proceedings. *Darden v. United States*, 405 *F. 2d 1054 (9th Cir. 1969); Barba-Reyes v. United States*, 387 *F.* 2d 91 (9th Cir. 1967); *Billeci v. United States*, 290 *F.* 2d 628 (9th Cir. 1961). Absent any assertion by petitioner that counsel's alleged inability to fairly prepare her case in some way manifested itself in the truth deciding stages, petitioner may not rely solely on the fact that evidence which was trustworthy and reliable was admitted against her. The essential fairness of her trial and the justice of her conviction are not called into question, and, therefore, petitioner fails to raise any issue of deprivation of counsel.

In closing, the State would note that, petitioner's claims to the contrary notwithstanding, this case does not involve any question of public importance. On the record presented, no evidence appears of the inability of the Office of the Public Defender to fairly represent defendants generally. More importantly, petitioner is without standing to challenge that entire system. Her claim falls or stands on the narrow, factual complex of this particular case. In short, the present petition presents a common, garden variety complaint which carries no significance to anyone but the petitioner. For that reason, the petition is not worthy of this Court's consideration.

CONCLUSION

For all the foregoing reasons, respondent, State of New Jersey, respectfully prays that the writ of certiorari sought in the above named petition pending before this Court not issue.
Respectfully submitted.

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